Supreme Court U.S.
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In the United States Supreme Court

WILLIAM COHEN,
Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA
Defendant-Appellee

Docket No. _____
October 1998 Term

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit 11th Circuit Docket No. 97-8737

Submitted on behalf of Plaintiff William Cohen by
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

WILLIAM COHEN,
Plaintiff,

V.

CIVIL ACTION
NO. CV294-179

UNITED STATES OF AMERICA
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action by Plaintiff, William Cohen, pursuant to the Federal Tort Claims Act, 28 USC § § 1346(b) and 2671. In substance, Cohen alleges that the Bureau of Prisons failed to protect him adequately and subjected him to an unreasonable risk of harm from a brutal physical assault by another inmate during Cohen's incarceration.

The case came on for a bench trial on April 28, 1997, and after hearing evidence and arguments of counsel, the Court enters the following findings:

FINDINGS OF FACT

1. Cohen formerly was an inmate at the Federal Correctional Institute in Jesup, Georgia, where he was registered as Federal Register Number 12639-039.

2. Cohen was convicted of infringement of copyright laws and trafficking in counterfeit labels, and sentenced to an eighteen month period of confinement.

3. Cohen began to serve his sentence in February of 1991, when he was sixty years of age.

4. On February 12, 1991, Cohen was designated to the Federal Prison Camp at FCI Jesup, which is a minimum security level satellite camp.

5. On February 8, 1992, Cohen and six or seven other inmates, including Humberto "Bert" Garcia, Federal Register Number 41734-004, were watching television in a television viewing room at FCI Jesup Prison Camp.

6. According to the institution's schedule, inmates were permitted to see and hear the evening news in the television room.

7. While listening to the news on the appropriate channel, Garcia abruptly changed the channel to one showing belly dancers. Cohen reminded Garcia of the institution's schedule and returned the TV channel back to the news.

8. After the news was over, the other inmates, excepting Garcia, left the TV room.

9. While Garcia and Cohen were alone, Garcia violently struck Cohen in the back of his head with a steel folding chair.

10. Cohen was rendered unconscious, and prison officials found him lying on the floor of the television viewing room shortly after 7:00 P.M.

11. Cohen immediately was transferred to Wayne County Memorial Hospital for medical treatment and, thereafter, in view of his serious injuries, was transferred to St. Joseph's Hospital in Savannah, Georgia.

12. Cohen initially was diagnosed as having suffered a skull fracture and a subdural hematoma.

13. Cohen underwent brain surgery at St. Joseph's Hospital, and remained hospitalized for approximately three weeks.

14. Cohen has suffered other injuries as a result of the subdural hematoma, including a permanent loss of taste and smell, memory loss, a lack of ability to concentrate, vertigo, and severe headaches. He is totally and permanently disabled. He was sixty-two years of age at the time of the assault, with a life expectancy of approximately fifteen years.

15. Garcia, at the time of the assault was a thirty-four year old, virile, person. He was serving a lengthy sentence for possession with intent to distribute cocaine.

16. On November 29, 1990, Garcia was designated to FCI Jesup Prison Camp. Garcia was thirty-two years of age when he began serving his sentence and thirty-four years of age at the time of the assault.

17. The designation of inmates to security classification levels is governed by the procedures outlined in the Bureau of Prisons Security Designation and Custody Classification Manual. Security Designation Manual Policy Statement 5100.02 was in effect in 1990, at the time that Garcia was designated.

18. The security level Designation Procedures are as follows. First, the Clerk of Court sends the judgment in a criminal case to the United States Marshal's Office once sentencing is completed. The Marshal then assigns an eight digit inmate identification number. The Marshal also compiles copies of the Presentencing Report, prepared by the United States Probation Office, the FBI "rap sheet," the judgment and commitment order, and the Marshal's custodial record.

19. Second, the Marshal forwards these documents to the appropriate Community Corrections Manager at the Bureau of Prisons, and requests a designation.

20. Third, the Community Corrections Manager enters information into a computerized tracking system known as SENTRY, and a Security Designation Form is generated. The Security Designation Form contains a summary of any detainers or pending charges on file, the nature of the current offense, the expected length of incarceration, prior commitments, a history of escapes or attempted escapes, a history of violence as shown only by prior convictions, pre-commitment status, public safety factors, and judicial recommendations. It must contain prior convictions.

21. Fourth, the Regional Designator designates an institution based on the information contained in the Security Designation Form that is obtained from SENTRY, as well as Central Information and Management Variables, such as an inmate's age, sentence limitations, inmate monitoring concerns, the racial balance and overcrowding at a particular institution, and an inmate's prior arrests. The Regional Designator does not have access to the Presentence Report, the FBI "rap sheet," nor the judgment and commitment order. Nor does he have access to the prior arrest record of the inmate. The Regional Designator tallies a "score" based on the information contained in the Security Designation Form. The Regional Designator is permitted to deviate from the security level that corresponds with the score, and assign an inmate to a higher security level, but n[illegible] a lower one.

22. The Security Designation Form for Garcia indicated that he was convicted of a moderate security level offense, with no history of escape.

23. Garcia was designated by Regional Designator Judy Parks as a Minimum Security Level inmate with "out custody," who was eligible for prison camp placement.

24. An inmate with "out custody" is assigned to less secure housing and is eligible for work details outside the

institution's perimeter, so long as he is escorted by prison officials.

25. In designating Garcia, Parks did not have the benefit of the information disclosing Garcia's prior felony convictions or arrest record.

26. Next, as previously stated, Garcia has numerous prior arrests that were not factored into a Security Level Designation. Those arrests were included in his presentencing report. Between 1978 and 1 984, Garcia was arrested ten different times, including arrests for loitering, carrying a concealed firearm, possession of a machine gun, dealing in stolen property, possession and sale of various illegal drugs, conspiracy, aggravated assault, resisting arrest, forgery, grand larceny, homicide, and aggravated battery.

27. The Court concludes that Garcia's record demonstrates that he was a violent person and the Court so finds.

28. Garcia's prior convictions were not included in Security Designation Form required by the Bureau of Prison Regulations.

29. Cohen was designated as a Minimum Security Level I inmate with ii community custody," who is eligible for prison camp placement.

30. An inmate with ~ custody," is assigned to the least secure housing, is eligible for work details outside of the institution perimeters, with minimal supervision.

31. The Bureau of Prisons failed to follow its own Security Designation Manual Policy Statement 5100.02, which was in effect at the time Garcia's institution of confinement was designated. The Community Corrections Manager failed to follow the BOP regulations.

32. If the Community Corrections Manager had included Garcia's two prior convictions and lengthy arrest record showing a high propensity for violence in the Security Designation Form, the Regional Designator would have assigned Garcia to a higher level security institution.

33. The failure of the BOP personnel to follow the BOP regulations and policies was the proximate cause of Cohen's injuries and damages.

34. Cohen's injuries are severe and permanent. He has permanently lost his sense of smell and his sense of taste. He also suffers substantial physical and mental pain and suffering.

35. Cohen failed to establish any loss of future earnings with reasonable certainty, although his ability to work and labor has been destroyed because of his physical impairments.

36. Cohen's damages are $250,000.

CONCLUSIONS OF LAW

The Court has jurisdiction of this claim pursuant to the Federal Tort Claims Act ("FTCA"), which is codified in Sections 1346(b) and 2671 of Title 28 of the United States Code. The Act provides a general waiver of the sovereign immunity of the United States and allows private rights of action against the United States and its agencies for specified torts committed by federal government employees. In other words, the FTCA allows suits against the federal government as if those suits were filed against a private individual.

Pursuant to Section 2674, the United States "shall be liable, respecting the provisions of [the Act] relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." With very few exceptions that are not applicable in Cohen's case, the Act provides the exclusive

remedy for the injuries that Cohen claims to have suffered as a result of the alleged acts of employees at FCI Jesup.

The Act is limited by its terms, and private rights of action may be asserted against the United States only if specifically authorized by the Act. Pursuant to Section 1 346, a private plaintiff may bring suit for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Cohen exhausted his administrative remedies as required by Section 2675.

While the Act provides a general waiver of sovereign immunity, the Act also contains several exceptions that expressly disallow private rights of action against the United States.

Section 2680 of the Act outlines those exceptions, including the "discretionary function" exception that is codified at Section 2680(a). This Section of the Act expressly forbids private rights of action for "[any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The Court concludes as a matter of law, over objection by the United States, that subject matter jurisdiction over this matter is proper and that the discretionary function exception does not apply to the facts of this case for the reasons set forth in prior Orders of this Court disposing of motions to dismiss. Accordingly, the Court concludes that Cohen's action is properly before this Court.

The Court also concludes as a matter of law that the duty owed to Cohen while incarcerated at FCI Jesup is governed by both statute and regulation. Section 4042 of Title 1 8 of the United States Code establishes that the Bureau of Prisons owes a duty of care to inmates entrusted to that agency.

That section states that the Bureau of Prisons, under the direction of the Attorney General shall "provide suitable quarters and provide for the safekeeping care, and subsistence of all persons charged with or convicted of offenses against the United States." (emphasis supplied)

Section 4042(3) states that the Bureau of Prisons shall "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States."

Accordingly, the Court concludes as a matter of law that the Bureau of Prisons, acting through FCI Jesup employees, owed a non-discretionary, statutory duty of safekeeping, care, and protection of Cohen during his stay at that federal facility.

Additionally, the Security Designation Manual Policy Statement 1500.02, in combination with Section 3621(b) of Title 18 of the United States Code, govern the placement of inmates within federal correctional institutions and allows limited discretion to the federal employees tasked with placing federal inmates.

Section 3621(b) states that the Bureau of Prisons shall designate the place of a prisoner's confinement based upon (1) the resources of the facility, (2) the nature and circumstances of the offense, (3) the history and characteristics of the prisoner (4) any statement by the sentencing court, and (5) any pertinent policy statement issued by the Sentencing Commission.

Pursuant to Section 2674 of the Act, state substantive law applies concerning whether Cohen has stated a proper claim for relief.

The Court concludes as a matter of law that the negligence laws of the State of Georgia apply to the facts of this case.

Pursuant to the laws of Georgia, Cohen must establish four elements in order to prevail on his negligence claim against the United States. Cohen must establish that the Bureau of Prisons and FCI Jesup employees had a legal duty to protect him from unreasonable risks of harm, that such duty was breached, that there was a causal connection between that breach and his injuries, and that his loss, damage, or injury was proximately caused by Defendant's breach of the duty owed.

In order to recover for his claimed injuries, Cohen also is legally required to establish that the United States had some degree of notice of Garcia's propensity for violence before the Government may be held liable for the assault upon Cohen.

The Court concludes that the employees of the Bureau of Prisons failed to follow its own regulations in that the Community Correction Manager failed to include in the Security Designation Form the prior felony convictions of Garcia. If such convictions had been entered, and Garcia's lengthy arrest record considered, the officer charged with designating the corrections facility would have assigned Garcia to a higher level security institution than the Jesup Camp facility.

The Court concludes as a matter of law that Cohen has proven his right to recover under the negligence law of Georgia, and that the United States did have notice of Garcia's propensity for violence. The Court further concludes that Defendant failed to protect adequately Cohen from the attack by Garcia.

In coming to these conclusions, the Court has considered the two part test required to be used in order to determine whether challenged governmental conduct falls within the discretionary function exception. First, a determination must be made whether the challenged conduct involved an element of choice of judgment. The relevant inquiry is whether a controlling statute or regulation

mandates that a government agent perform his or her function in a specific function.

A determination must be made whether the choice or judgment made by the government official is of the kind that the discretionary function was designed to shield. In this case, as previously stated, the BOP failed to follow its own regulations mandating that its agents perform their functions in a specific manner.

Accordingly, the Court finds as a matter of fact and concludes as a matter of law that Cohen is entitled to a judgment in the sum of Two Hundred Fifty Thousand ($250,000) Dollars against the Defendant.

The Clerk is directed to enter an appropriate judgment in accordance with the findings and conclusions.

SO ORDERED, this 15th day of May, 1997.

/s/ Anthony A. Alaimo
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

AO 450 (Rev. 5/85) Judgment in a Civil Action

United States District Court

Southern District of Georgia

WILLIAM COHEN

JUDGMENT IN A CIVIL CASE
CASE NUMBER CV294-179

v

UNITED STATES OF AMERICA

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that in accordance with the Findings of Fact and Conclusions of Law entered by the Court on May 15, 1997 finding that the Plaintiff is entitled to a judgment; judgment is hereby entered in favor of the Plaintiff, WILLIAM COHEN, and against the Defendant, UNITED STATES OF AMERICA, in the amount of TWO HUNDRED FIFTY THOUSAND DOLLARS AND ZERO CENTS ($250,000.00), and that the Plaintiff does have and recover his costs of Court, in his behalf expended, such costs to be taxed by the Clerk.

Approved: /s/ Anthony A. Alaimo

Judge, U.S. District Court

May 15, 1997
Date

Henry R. Crumley, Jr.
Clerk

/s/ Sherry Taylor
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

WILLIAM COHEN, CIVIL ACTION

Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant. NO. CV294-179

ORDER

William Cohen, a former inmate at the Federal Correctional Institution in Jesup, Georgia ("FCI Jesup"), brings this action, pro se under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346; 2671, et seq., for injuries resulting from an assault upon him by another inmate.

Cohen claims that the Government failed to protect him from foreseeable assault and failed to follow proper procedures in assigning his assailant to a minimum security prison camp rather than to a properly supervised institution.

Before the Court is the Government's Motion to Dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Government contends that the Court lacks subject matter jurisdiction over this matter because it falls within the discretionary function exception to the FTCA. As discussed below, the Government's motion will be **DENIED.**

FACTS

In 1991, William Cohen was sentenced to eighteen months in prison for infringement of copyright laws and trafficking in counterfeit labels. After reviewing Cohen's file, prison officials rated Cohen as a "minimum" security inmate with "community" custody. As a result of these ratings, prison officials designated

Cohen to FCI Jesup Prison Camp, a "minimum" security facility for inmates with "community" custody or "out" custody.

On February 8, 1992, Cohen was watching television in the television room at FCI Jesup. Cohen and another inmate, Humberto Garcia, began arguing about changing the channel. Garcia then attacked Cohen and struck him in the head with a metal folding chair. No one witnessed the incident. At the time of the attack, Cohen was sixty years old. Garcia was thirty-three.

Shortly after 7:00 P.M., prison officials found Cohen unconscious on the floor of the television room. He was bleeding from his ears and mouth. After prison health providers examined Cohen, they transferred him to Wayne County Memorial Hospital where he was diagnosed as having a possible skull fracture and a subdural hematoma. Cohen later underwent brain surgery at St. Joseph's Hospital in Savannah, Georgia.

According to his complaint, Cohen suffers permanent injuries including a loss of sense of smell and taste, headaches, memory loss, lack of concentration, and general weakness. He also contends that he will never be able to maintain gainful employment.

At the time of the incident, Garcia was serving a five to forty year sentence for possession of cocaine with intent to distribute. He had been an inmate at FCI Jesup since November of 1990, when prison officials rated him as a "security level one" inmate with "out" custody.

Garcia received a "security level one" rating despite his previous convictions and extensive arrest record. Over the span of several years, Garcia was arrested for burglary, loitering, carrying a concealed firearm, possession of quaaludes, aggravated assault on a police officer, possession of cocaine, intimidation of a public officer, possession of a machine gun and attempted murder. None of these arrests resulted in a conviction. Garcia did have prior convictions for conspiracy to commit a felony, carrying a concealed firearm, and resisting arrest without violence.

Cohen contends that the Government failed to follow its own procedures in rating Garcia as a "security level one" inmate and designating him to a "minimum" security facility. Cohen also argues that prison officials failed to supervise Garcia so as to protect Cohen from a foreseeable attack.

After the attack, prison officials transferred Garcia to a prison facility with higher security standards than FCI Jesup.

PROCEDURAL BACKGROUND

On March 20, 1995, the Government filed a motion for summary judgment contending that it was not negligent as a matter of law. The Court denied the motion after finding that genuine issues of material fact remained as to whether the Government was negligent.

On May 23, 1995, the Government filed the present motion to dismiss, contending that the Court lacks subject matter jurisdiction over this case because it falls within the discretionary function exception to the FTCA.

DISCUSSION

I. Motion to Dismiss under 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a defendant to move to dismiss a complaint on the ground that the Court lacks subject matter jurisdiction. A 12(b)(1) motion can take either of two forms. A "facial attack" on the complaint requires the court to assess whether the plaintiff has alleged a sufficient basis of subject matter jurisdiction. Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990) (citing Menchaca v. Chrysler Credit Corp. 613 F.2d 507, 511 (5th Cir.), cert. denied, 449 U.S. 953 (1980)). For purposes of a "facial attack," the allegations in the complaint are taken as true. Lawrence, 919 F.2d at 1529.

The second type of 12(b)(1) motion is a "factual attack," which challenges the court's subject matter jurisdiction "in fact."

Id. In evaluating a "factual attack," the Court may consider matters outside the pleadings, and "no presumptive truthfulness attaches to plaintiff's allegations." Id. Furthermore, "the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Id.

Here, the Government asserts the FTCA's discretionary function exception, thereby requiring a factual inquiry as to whether this exception indeed applies. Accordingly, the Court will consider materials outside of the pleadings, and "no presumptive truthfulness" will attach to Cohen's allegations. Id. If the discretionary function exception applies, the case must be dismissed for lack of subject matter jurisdiction. Williams v. United States, 50 F.3d 299, 3C5 (4th Cr. 1995).

II. Discretionary Function Exception to the FTCA

The United States may not be sued unless it waives sovereign immunity. The FTCA constitutes such a waiver by providing a cause of action against the United States for plaintiffs injured by "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1976). The FTCA's waiver of sovereign immunity is limited, however, by the discretionary function exception which precludes any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

In determining whether the discretionary function exception applies, the Court conducts a two-part test. First, the Court must determine whether the decision at issue is discretionary. Berkovitz v. United States, 486 U.S. 531, 536 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988) If the decision is discretionary the Court must then determine whether the decision involves consideration of social, economic or political policies. Id. If both tests are satisfied, the discretionary function exception applies. In conducting the two-part test, the Court should focus on the "nature of the conduct," rather than the status of the government actor. United States v. S.A. Empresa de Viacao Aerea

Rio Grandense (Varig Airlines), 467 U.S. 797, 813, 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984).

A. Is the Decision Discretionary?

A particular decision is discretionary if it involves an "element of judgment or choice." Berkovitz, 486 U.S. at 536. The discretion referred to is "the discretion of the executive or the administrator to act according to one's judgment of the best course . . .." Dalehite v. United States, 346 U.S. 1 5, 34, 73 S.Ct. 956, 967, 97 L.Ed. 1427 (1953). Accordingly, a decision is not discretionary if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." Berkovitz, 486 U.S. at 536. As the Supreme Court has noted, "if an employee violates the mandatory regulation[] there will be no shelter from liability because there is no room for choice." United States v. Gaubert, 499 U.S. 315, 324, 111 S.Ct. 1267, 1274, 113 L.Ed.2d 335 (1991).

For a regulation or policy to be considered mandatory, however, it must constitute a "specific mandatory directive," such that "those charged with [the regulation's) implementation are not afforded wide latitude regarding its execution." Berkovitz, 486 U.S. at 544.

B. Is the Discretionary Decision Grounded in Social, Economic or Political Policy?

If the decision involved is indeed discretionary, the Court must then decide whether the choice or judgment is of the kind that Congress intended to shield from tort liability. Varig Airlines, 467 U.S. at 813. In this regard, the discretionary function is designed to shield "legislative and administrative decisions grounded in social, economic, and political policy." Id. at 814. "The presumption under the law is that when exercising discretion accorded to it, the government's actions will be grounded in policy." Kirchmann v. United States, 8 F.3d 1273, 1277 (8th Cir.

1993). As the Fourth Circuit has noted, a decision is grounded in policy if the government employee's "judgment or choice advances the purposes of a regulatory scheme that gives an employee such discretion." Williams 50 F.3d at 309.

III. Prison Officials' Decision to Designate Garcia to FCI Jesup Prison Camp

Cohen contends that the Government failed to follow its own procedures in assigning Garcia to a minimum security facility. The Government argues that designation of inmates to particular facilities within the federal prison system is protected by the discretionary function exception to the FTCA.

Generally, "[t]he discretionary exception to the FTCA bars any recovery predicated on the classification of inmates." Bailor v. Salvation Army, 854 F. Supp. 1341, 1366 (N.D. Ind. 1994)(quoting Reed v. Hadden, 473 F. Supp. 658, 660 (D. Colo. 1979)), aff'd, 51 F.3d 678 (7th Cir. 1995). Indeed, the Bureau of Prisons is granted discretion in designating inmates to particular institutions. See e.g. 18 U.S.C. § 3621(b).

Nonetheless, prison officials do not have discretion to ignore the required steps of the decision-making process. Bailor, 854 F. Supp. at 1 366 (citing Payton v. United States, 679 F.2d 475, 481 (5th Cir. 1982)). Furthermore, if a policy or regulation specifically prescribes a course of action," then the discretionary function exception does not apply, for the prison official "has no rightful option but to adhere to the directive." Berkovitz, 486 U.S. at 536. Accordingly, when evaluating the propriety of the discretionary function exception, the district court must consider any policies or regulations which govern the decision at issue. See, e.g., Valdez v. United States, 56 F.3d 1177 (9th Cir. 1995)(court examined National Park Service Guidelines); Sanchez v. Bellefeuille, 855 F. Supp. 587 (N.D.N.Y. 1994)(court examined Border Patrol handbook); Bailor, 854 F. Supp. at 1367 (court examined prison Program Statements).

The designation of prisoners to particular institutions is governed by the "Security Designation and Custody Classification

Manual, Program Statement 5100.05" ("Program Statement"). The Program Statement provides detailed, step-by-step procedures for designating inmates to various federal prison facilities. Some of these procedures constitute "specific mandatory directives" such that prison officials have no choice but to adhere to them. For example, prison officials "shall complete . . . a Security Designation Form on all cases with terms exceeding thirty days." (Program Statement, Chap. 4, p. 2)(emphasis added) The Program Statement also dictates specific, "required" information that must be included on the Security Designation Form such as "any history of incarceration, violence, or escape." (Program Statement, Chap. 4, p.2) Furthermore, affidavits submitted by the Government indicate that particular portions of the designation process are rather mechanical and non-discretionary: "[Garcia] 'scored out' as being appropriate for a satellite camp designation." (Binion Aff. ¶ 5)(emphasis added)

Other aspects of the designation process, however, require the exercise of discretion. For example, prison officials must use their best judgment in deciding whether an inmate's designation should be affected by certain "overriding reasons such as Sentence Limitations, Management Variables or Public Safety Factors. (Program Statement, Chap. 4, p.3).

Accordingly, while the discretionary function exception may apply to some procedures in the Program Statement, it does not apply to other procedures. At the present time, the record is unclear as to which provisions of the Program Statement Cohen contends were violated. Thus, dismissal of Cohen's complaint is premature.

As the Supreme Court has noted, allegations contained in a pro se complaint are to be held "to less stringent standards than formal pleadings drafted by lawyers Haines v. Kerner, 404 U.S. 519,520,92 S.Ct. 594,30 L.Ed.2d 652(1972). Under this standard, dismissal is inappropriate.

IV. Prison Officials' Failure to Protect Cohen

Cohen contends that the Government was negligent in failing to protect him from Garcia when it knew of Garcia's violent propensities. Again, the Government argues that the discretionary function exception bars Cohen's claim.

The discretionary function exception does not apply to claims such as this. United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); Cohen v. United States, 252 F. Supp. 679, 687 (N.D. Ga. 1966), rev'd on other grounds, 389 F.2d 689 (5th Cr. 1967). In United State v. Muniz, the Supreme Court held that an action may be maintained under the FTCA for personal injuries sustained by a federal prisoner as a result of the negligent acts or omissions of government employees. Muniz, 374 U.S. at 1 52. In Cohen v. United States, the court adhered to this principle by refusing to apply the discretionary function exception to a federal prisoner's FTCA claim based upon assault by another inmate:

"Whatever is done or not done at any institution involves a decision by someone, but this does not mean that all acts are exempt from tortious liability as discretionary." Cohen, 252 F. Supp. at 687. As stated in the Court's previous order, "[in prisoner assault cases, the proper inquiry is 'whether [the] assault on [the plaintiff] was a danger that was apparent or should have been apparent to prison officials on the basis of the information then available to them.'" Order, Apr. 28, 1995 at 7 (Dkt. # 9)(quoting Cowart v. United States, 617 F.2d 112, 11 6 (5th Cir. 1980)).

CONCLUSION

For the reasons stated above, the Government's Motion to Dismiss (Dkt. # 13) is **DENIED.**

SO ORDERED, this 21st day of July, 1995.

/s/ Anthony A. Alaimo
JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

WILLIAM COHEN, CIVIL ACTION

Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant. NO. CV294-179

ORDER

William Cohen, a former inmate at the Federal Correctional Institution in Jesup, Georgia ("FCI Jesup"), brings this action, pro se, under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346; 2671 et sea., for injuries resulting from an assault upon him by another inmate, Humberto Garcia. Cohen claims that the Government, as it acted through the Federal Bureau of Prisons ("BOP"), failed to protect him from foreseeable assault and failed to follow proper procedures by assigning his assailant to a minimum security prison camp, rather than to a properly supervised institution.

Before the Court is the Government's Renewed Motion to Dismiss or, in the alternative, for Summary Judgment. In this motion, the Government contends that Cohen's claim relating to the improper assignment of his assailant is barred by the discretionary function exception to FTCA. This issue has already been discussed by the Court in two previous orders. (See Court's Orders of April 28, 1995 and July 21, 1995). For the reasons stated below, this renewed motion will be DENIED.

In the Order of July 21, 1995 the Court stated:

> Generally, "[t]he discretionary exception to the FTCA bars any recovery predicated on the classification of inmates." Bailor v. Salvation Army, 854 F. Supp. 1 341, 1 366 (N.D. Ind. 1 994)(quoting Reed v. Hadden, 473 F. Supp. 658, 660 (D. Coo. 1979)), aff'd, 51 F.3d 678 (7th Cir. 1995). Indeed, the Bureau of Prisons is granted discretion in designating inmates to particular institutions. See, e.g., 18 U.S.C. § 3621(b).
>
> Nonetheless, prison officials do not have discretion to ignore the required steps of the decision-making process. Bailor, 854 F. Supp. at 1366 (citing Payton v. United States, 679 F.2d 475, 481 (5th Cir. 1982)). Furthermore, if a policy or regulation "specifically prescribes a course of action," then the discretionary function exception does not apply, for the prison official "has no rightful option but to adhere to the directive." Berkovitz, 486 U.S. at 536.

(Order p.8).

At the time of the Court's previous order, the correctness of BOP's actions was not clear. Insufficient information was presented and the Court was unable to determine if BOP complied with Program Statement 5100.2, a policy statement which detailed the manner for designating the security level for federal inmates. As the Court stated at the time, BOP cannot meet the requirements of the discretionary function exception if its actions did not comply with its own policy and regulatory guidelines. Bailor, 854 F. Supp. at 1 366 (citing Payton v. United States, 679 F.2d 475, 481(5th Cir. 1982)).

The Government's present motion provides the Court with additional information. A blank inmate load and security designation form and instructions, which are used to calculate the security level of an inmate, have been provided to the Court. (Def. Ex. 1, Attach. A, Sec. 8-9). Affidavits by BOP employees have also been provided in an attempt to explain the security designation form. (See Det. Ex. 1, 2). While this information is helpful, it does not provide a sufficient basis for the Court to conclude that BOP complied with the requirements of Program Statement 5100.2.

The Court has not been provided with a completed inmate load and security form detailing the characteristics of Cohen's attacker, Garcia. In addition, the Court has not been provided with sufficient information to recreate this form. The Court is also troubled by the fact that BOP officials have stated under oath that Cohen's attacker had no previous convictions, while information provided by Cohen indicates that Garcia had at least one conviction. (See Def. Ex. 1 ¶ 16, Def. Ex. 2 ¶ 4, and Pl. Ex. 2 p.5).

CONCLUSION

Under these circumstances, the Court cannot conclude that the BOP fully complied with its own policies and regulations. Allegations contained in a pro se complaint are to be held "to less stringent standards than formal pleadings drafted by lawyers. . . ." Haines v. Kerner, 404 U.S. 519, 520 (1972). As such, the Government's motion to dismiss or, in the alternative, for summary judgment is **DENIED.**

SO ORDERED, this 6th day of February, 1996.

/s/ Anthony A. Alaimo
JUDGE, UNITED STATES' DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8737.

William COHEN,
Plaintiff-Appellee, Cross-Appellant,
v.
UNITED STATES of America,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Georgia
Aug. 26, 1998.

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

CARNES, Circuit Judge:

While incarcerated in a minimum security federal prison, plaintiff William Cohen was injured when he was attacked by another prisoner. He sued the United States under the Federal Tort Claims Act asserting that the Bureau of Prisons had negligently assigned his attacker to a minimum security prison. After a bench trial, the district court entered judgment for Cohen and awarded him $250,000. Because we conclude that the discretionary function exception to the Federal Tort Claims Act shields the United States from liability in this case, we reverse that judgment.

I. BACKGROUND

In 1991, Cohen was sentenced to eighteen months in prison for copyright violations. The Bureau of Prisons ("BOP") classified him as "security level 1," the lowest security classification in the federal correction system, and it placed him in the minimum security Community Corrections Center at the Jesup, Georgia

Federal Corrections Institution. On February 8, 1992, Cohen was watching television in a common area of the prison. When Humberto Garcia, one of the other inmates, changed the channel, Cohen objected and changed the television back to its original channel. Later, after all the other inmates had left the room, Garcia picked up a metal chair and repeatedly beat Cohen on the head. As a result of Garcia's attack, Cohen underwent neurological surgery and spent three weeks in the hospital. Since his hospitalization, Cohen is unable to walk normally, suffers from severe headaches, has permanent short- term memory problems, and has lost his sense of taste and smell. After exhausting his administrative remedies, Cohen filed a claim against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq., alleging that the government's negligence was responsible for his injuries. After a bench trial, the district court entered judgment in favor of Cohen, rejecting the government's arguments (1) that the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a) barred Cohen's FTCA claim and therefore deprived the district court of jurisdiction, and (2) that the BOP had not been negligent. The court awarded Cohen $250,000 in damages.

The United States appeals, challenging the district court's legal conclusion that the discretionary function exception did not apply, and its factual finding that the BOP was negligent. Cohen cross-appeals, seeking increased damages.

II. STANDARD OF REVIEW

We review a district court's legal conclusion de novo and its fact findings for clear error. See, *e.g.*, *Lykes Bros., Inc. v. United States Army Corps of Eng'rs*, 64 F.3d 630, 634 (11th Cir.1995). Whether the United States is entitled to application of the discretionary function exception to the FTCA is a question of law we review de novo. See *Ochran v. United States*, 117 F.3d 495, 499-500 (11th Cir.1997).

III. DISCUSSION

Cohen's theory of liability is that the BOP was negligent in classifying Garcia as "security level 1," the lowest security classification in the federal correction system, and placing him at the minimum security Jesup institution. According to Cohen, had Garcia been assigned a higher security level as allegedly warranted by his criminal history, Garcia's attack and Cohen's injuries would not have occurred. The Government contends that it cannot be held liable for any alleged negligence in determining Garcia's custody classification because the prisoner custody classification process performed by the BOP falls within the FTCA's discretionary function exception, 28 U.S.C. § 2680(a). Cohen first responds that the discretionary function exception does not apply to the BOP's classification of prisoners because 18 U.S.C. § 4042 establishes a non-discretionary duty of care on the part of the BOP toward prisoners which removes any discretion the BOP might otherwise have in this regard. In the alternative, Cohen argues that even if Congress did allow the BOP discretion in classifying prisoners, the BOP constrained its discretion in this regard by promulgating internal guidelines for its personnel to follow in classifying prisoners. According to Cohen, because BOP personnel did not follow those guidelines when they classified Garcia, the discretionary function exception does not apply in this case.

In addressing these contentions, we will begin by discussing the nature of the discretionary function exception and the prerequisites for its application. We will then discuss whether the BOP's classification of prisoners and placement of them in institutions meet those criteria. Finally, we will discuss whether the BOP failed to follow its own guidelines concerning the classification of prisoners with the result that the discretionary function exception is inapplicable in this case.

A. The Discretionary Function Exception

The FTCA "waives the United States government's sovereign immunity from suit in federal courts for the negligent actions of its employees." *Ochran*, 117 F.3d at 499. The FTCA waiver of immunity is subject to several exceptions. The

discretionary function exception, which is at issue in this case, precludes government liability for "[a]ny claim based upon ... the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). If the discretionary function exception applies, the FTCA claim must be dismissed for lack of subject matter jurisdiction. See, *e.g.*, *Powers v. United States*, 996 F.2d 1121, 1126 (11th Cir.1993). The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808, 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984). Congress believed that imposing liability on the government for its employees' discretionary acts "would seriously handicap efficient governmental operations." *Id.* at 814, 104 S.Ct. at 2765 (internal citations and quotations omitted).

The Supreme Court has enunciated a two-part test for determining whether the discretionary function exception bars suit against the United States in a given case. See *Ochran*, 117 F.3d at 499. First, "we consider the nature of the conduct and determine whether it involves 'an element of judgment or choice.' " Id. (quoting *United States v. Gaubert*, 499 U.S. 315, 322, 111 S.Ct. 1267, 1273, 113 L.Ed.2d 335 (1991)). "Government conduct does not involve an element of judgment or choice, and thus is not discretionary, if 'a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive.' " Id. (quoting *Gaubert*, 499 U.S. at 322, 111 S.Ct. at 1273 (internal citations and quotations omitted)).

Second, "if the conduct at issue involves the exercise of judgment, we must determine whether that judgment is grounded in considerations of public policy." Id. "[T]he purpose of the exception is to prevent judicial second-guessing of legislative and

administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 323, 111 S.Ct. at 1273 (internal quotations and citations omitted). "In making this determination, we do not focus on the subjective intent of the government employee or inquire whether the employee actually weighed social, economic, and political policy considerations before acting." *Ochran*, 117 F.3d at 500. Instead, we "focus on the nature of the actions taken and on whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325, 111 S.Ct. at 1275.

B. Whether the BOP's Classification of Prisoners and Placement of Them in Institutions Involves Conduct or Decisions That Fall Within the Discretionary Function Exception

In determining whether the discretionary function exception applies in this case, we first address whether the BOP's decisions concerning classification of prisoners and what institution to place them in "involve an element of judgment or choice." *Gaubert*, 499 U.S. at 322, 111 S.Ct. at 1273. Cohen contends that the BOP's decisions in this regard do not meet this first prong of the two-part discretionary function exception test. In support of his contention, Cohen points to 18 U.S.C. § 4042, which provides in relevant part that "[t]he Bureau of Prisons, under the direction of the Attorney General, shall ... provide for the safekeeping, care, and ... protection ... of all persons charged with or convicted of offenses against the United States." He contends that this language establishes a non-discretionary duty of care toward prisoners. In particular, Cohen argues that the § 4042 duty of care applies to the BOP's decisions concerning prisoner custody classification and thus removes cases, such as this one, where one prisoner assaults another, from the discretionary function exception. Under Cohen's theory, the BOP violated its § 4042 duty of care when it classified Garcia at the lowest security classification and placed him in the same minimum security institution as Cohen.

Cohen cites several decisions which he asserts support his contention that § 4042 imposes a non-discretionary duty of care on

BOP personnel and takes this case outside the discretionary function exception. However, we find those decisions neither controlling nor persuasive on this issue. First, Cohen cites the Supreme Court's decision in *United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963). In that case, the Supreme Court merely held that prisoners as a class were not barred from bringing claims under the FTCA. See id. at 158, 83 S.Ct. at 1855. However, the Court expressly reserved the issue of whether the discretionary function exception applies to cases in which prisoners allege that the BOP has negligently violated a duty of care. See *id.* at 163, 83 S.Ct. at 1858 (declining to "intimate any opinion upon [the] applicability" of the discretionary function exception to negligence claims brought by the prisoners in that case).

Next, Cohen cites a pair of former Fifth Circuit cases, *Jones v. United States*, 534 F.2d 53 (5th Cir.1976), and *Cowart v. United States*, 617 F.2d 112 (5th Cir.1980). In both *Jones* and *Cowart*, we simply affirmed the district court's finding that the BOP had not breached any duty of care owed to a prisoner who was attacked by another prisoner. See *Jones*, 534 F.2d at 55; *Cowart*, 617 F.2d at 119. Because we did not address the discretionary function exception, and did not find liability in Jones, that case cannot support Cohen's position that § 4042 establishes a non-discretionary duty that removes from the discretionary function exception cases in which prisoners in the care of the BOP are assaulted by another prisoner.

As for *Cowart*, although not essential to the holding, we did state that the discretionary function exception does not apply to cases in which a prisoner alleges negligence on the part of the BOP because "the actions of prison officials are at the 'operational level.' " *Cowart*, 617 F.2d at 116 n. 15. However, any weight that would otherwise attach to that dicta has been vitiated by the Supreme Court's subsequent decision in *United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). The Supreme Court held in *Gaubert* that the mere fact a government official performs an action at the "operational level" (as opposed to the "planning level") does not remove that official's action from the discretionary

function exception for purposes of suits under the FTCA. See *id.* at 325, 111 S.Ct. at 1275. Where one of our prior panel opinions conflicts with a later Supreme Court decision, we are compelled to follow the Supreme Court's decision. See, *e.g.*, *Gianelli Money Purchase Plan and Trust v. ADM Investor Serv., Inc.*, 146 F.3d 1309 (11th Cir.1998); *Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir.1996). We do so here.

Finally, Cohen cites the Third Circuit's decision in *Jones v. United States*, 91 F.3d 623 (3d Cir.1996). In that case, a prisoner alleged that the BOP, by withholding his medication, had breached the § 4042 duty of care to protect him. The Third Circuit held that those allegations were sufficient to avoid summary judgment. See *id.* at 625. However, because the panel in that case did not even discuss the discretionary function exception, that case does not persuade us to adopt Cohen's proposition that § 4042 establishes a non- discretionary duty that makes the discretionary function exception inapplicable in cases, such as Cohen's, where a prisoner is attacked by another prisoner.

Furthermore, even if § 4042 imposes on the BOP a general duty of care to safeguard prisoners, the BOP retains sufficient discretion in the means it may use to fulfill that duty to trigger the discretionary function exception. We believe our conclusion in this regard is mandated by our holding in *Ochran v. United States*, 117 F.3d 495 (11th Cir.1997), and is buttressed by the Seventh Circuit's decision in *Calderon v. United States*, 123 F.3d 947 (7th Cir.1997). In *Ochran*, a witness in a federal drug trial was harmed by the drug defendant, allegedly due to the failure of the United States Attorney to protect her. The plaintiff argued that a regulation which required the United States Attorney to protect her created a non-discretionary duty, with the result that the discretionary function exception did not shield the United States from liability under the FTCA. Not unlike § 4042, the regulation at issue there stated that United States Attorneys "shall ... protect [witnesses] against ... harm ... from a suspect." *Ochran* 117 F.3d at 500. We nonetheless held in *Ochran* that the discretionary function exception did apply because the use of the language "shall

... protect" did not mean that the regulation "left no room for the [U.S. Attorney] to exercise judgment or choice" about how to protect witnesses. Id. at 500. Thus, *Ochran* stands for the proposition that even though a statute or regulation imposes a general duty on a government agency, the discretionary function exception may still apply if the agency retains sufficient discretion in fulfilling that duty. That is what we have in this case.

The Seventh Circuit's reasoning in *Calderon* also convinces us that § 4042 leaves BOP personnel sufficient discretion about how their § 4042 duty of care is to be accomplished to warrant application of the discretionary function exception. Calderon rejected the argument that the general duty to protect prisoners set forth in § 4042 prevents the Government from invoking the discretionary function exception in an FTCA case arising from a prisoner-on-prisoner attack. The Seventh Circuit reasoned persuasively that "[w]hile it is true that [§ 4042] sets forth a mandatory duty of care, it does not, however, direct the manner by which the BOP must fulfill this duty. The statute sets forth no particular conduct the BOP personnel should engage in or avoid while attempting to fulfill their duty to protect inmates." *Calderon* 123 F.3d at 950. We agree.

Thus Cohen's reliance on § 4042 is misplaced. As the Seventh Circuit explained, for such an "argument to be effective, [the plaintiff] must demonstrate that § 4042 sets forth nondiscretionary actions which BOP personnel were required to undertake to protect [him]." *Id.* Section 4042 does not set forth any required nondiscretionary actions. Therefore, we reject Cohen's argument that § 4042 imposes a non-discretionary duty of care on the BOP which removes this case from the discretionary function exception.

Nor does any other statutory provision impose a non-discretionary duty of care on the BOP in classifying prisoners and placing them in institutions. To the contrary, two statutory provisions give the BOP discretion in this regard. The first of these is 18 U.S.C § 4081, which provides in relevant part that prisoners

should be classified:

> according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to [Federal penal and correctional] institutions.

18 U.S.C. § 4081. The second provision, 18 U.S.C. § 3621, provides in relevant part that the BOP:

> shall designate the place of the prisoner's imprisonment. The [BOP] may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the [BOP] ... that the [BOP] determines to be appropriate and suitable, considering--
>
> (1) the resources of the facility contemplated;
>
> (2) the nature and circumstances of the offense;
>
> (3) the history and characteristics of the prisoner;
>
> (4) any statement by the court that imposed the sentence--
>
> (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
>
> (B) recommending a type of penal or correctional facility as appropriate; and
>
> (5) any pertinent policy issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

18 U.S.C. § 3621(b).

These statutory provisions do not mandate a specific, non-discretionary course of conduct for the BOP to follow in classifying prisoners and placing them in a particular institution. Instead, they give the BOP ample room for judgment by listing a non-exhaustive set of factors for the BOP to consider and leaving to the BOP what weight to assign to any particular factor. In particular, the language granting the BOP authority to "designate any available penal or correctional facility ... that the [BOP] determines to be appropriate and suitable," 18 U.S.C. § 3621(b), is indicative of Congress' intent to allow the BOP to rely on its own judgment in classifying prisoners and placing them in institutions. Our conclusion that Congress intended to give the BOP discretion in making its classification decisions and determinations about

placement of prisoners is reinforced by the Senate Report accompanying the legislation that became 18 U.S.C. § 3621. That report provides in pertinent part:

> The Committee, by listing factors for the [BOP] to consider in determining the appropriateness or suitability of any available facility, does not intend to restrict or limit the [BOP] in the exercise of its existing discretion so long as the facility meets the minimum standards of health and habitability of the [BOP], but intends simply to set forth the appropriate factors that the [BOP] should consider in making the designations.

S.Rep. No. 98-225, 98th Cong., 2d Sess. 142, reprinted in 1984 U.S.Code Cong. & Admin. News 3182, 3325. Accordingly, the first part of the two-part discretionary function exception test, the element of judgment or choice prong, is satisfied in this case.

We turn now to the second prong, which requires that we determine whether the judgment or discretion the BOP exercises in this regard is the type of discretion which the discretionary function exception is intended to protect. More specifically, we must decide whether the nature of the decision or conduct at issue is "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325, 111 S.Ct. at 1275. As the Supreme Court noted in *Gaubert*, we presume that actions or decisions are "grounded in [public] policy" in cases where the statute allows government officials to exercise discretion. *Id.* at 324, 111 S.Ct. at 1274. Deciding how to classify prisoners and choosing the institution in which to place them are part and parcel of the inherently policy-laden endeavor of maintaining order and preserving security within our nation's prisons. See *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979) ("Prison administrators ... should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

This case exemplifies the type of case Congress must have had in mind when it enacted the discretionary function exception.

Under Cohen's theory, anytime a prisoner is injured by another prisoner, he can bring an action claiming that the BOP was negligent in classifying the prisoner who committed the assault and placing him in the institution at which the attack occurred, or in not removing that prisoner based upon some prior incident, or in not restricting his movement, or in not providing more guards, and so forth. Such second-guessing of the BOP's discretionary decisions is the type of thing avoided by the discretionary function exception, which is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Gaubert*, 499 U.S. at 323, 111 S.Ct. at 1273 (internal citations and quotations omitted).

Accordingly, we conclude that the BOP's actions in classifying prisoners and placing them in institutions involve conduct or decisions that meet both prerequisites for application of the discretionary function exception.

C. Whether the Alleged Failure of the BOP to Follow Its Own Guidelines Concerning the Classification of Prisoners Renders the Discretionary Function Exception Inapplicable

Cohen argues that even if Congress gave the BOP discretion in classifying prisoners and placing them in institutions, the BOP constrained its discretion in this regard by promulgating internal guidelines set forth in Program Statement 5100.2 (the "Program Statement"). According to Cohen, because BOP personnel violated provisions of the Program Statement when they classified Garcia as suitable for the lowest security classification level and placed him at the minimum security Jesup institution, the discretionary function exception does not apply in this case. The district court found that the BOP failed to adhere to the Program Statement when its employees improperly filled out a "security designation form" as part of the process of determining Garcia's custody classification.

Where Congress has granted an agency discretion in

implementing a regulatory statute, the agency's promulgation of regulations or guidelines describing how it will use that discretion is protected by the discretionary function exception. See *Gaubert*, 499 U.S. at 323, 111 S.Ct. at 1274. Furthermore, if the regulation or guideline "mandates particular conduct, and the [agency's] employee obeys the direction, the Government will be protected [by the discretionary function exception] because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation [or guideline.]" *Id.* at 324, 111 S.Ct. at 1274. On the other hand, "[i]f the employee violates the mandatory regulation [or guideline], there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." *Id.*

As we have discussed, Congress has given the BOP discretion in classifying prisoners and placing them in institutions. Accordingly, under *Gaubert*, the BOP's guidelines, as set forth in the Program Statement, and the actions of BOP personnel consistent with those guidelines are insulated by the discretionary function exception. The issue we must address is whether the district court correctly found that the BOP personnel failed to follow the guidelines in the Program Statement when they filled out Garcia's security designation form. We conclude that the district court clearly erred in reaching that conclusion.

The district court found that BOP personnel failed to follow the Program Statement guidelines in filling out Garcia's security designation form because they did not include Garcia's two prior felony convictions on that form. Garcia's two prior convictions, neither of which resulted in incarceration, were for (1) possession and sale of cocaine and (2) possession of cocaine, possession of a firearm, and resisting arrest without violence. Although the district court did not specify where on the security designation form those convictions should have been listed, Cohen contends BOP personnel were required to include them under either the "Prior Commitment" or "History of Violence" sections of the form. We disagree.

The Program Statement explicitly states that only

convictions which resulted in confinement should be included in the Prior Commitment section. Because Garcia's two prior convictions did not result in confinement, they were properly omitted from that section. As for the History of Violence section, nothing in the Program Statement requires including in that section convictions of possession and sale of cocaine, possession of a firearm, or resisting arrest without violence. Thus the district court clearly erred in finding that BOP personnel incorrectly filled out Garcia's security designation form. Accordingly, Cohen's argument, which the district court accepted, that the discretionary function exception does not apply because the BOP failed to follow its own guidelines is without merit.

Cohen also claims that the BOP failed to follow the Program Statement when it classified Garcia at the lowest security level, because the Program Statement did not allow aliens to be classified at that level. This argument fails both because the district court did not find that Garcia was an alien, and because the Program Statement provides that the BOP's regional director retains the discretion to assign an alien to the lowest security level.

D. Summary

To sum up, we hold that (1) the BOP's actions in classifying prisoners and placing them in institutions involve conduct or decisions that fall within the discretionary function exception; (2) 18 U.S.C. § 4042 does not render the discretionary function exception inapplicable to cases, such as this one, in which a prisoner attacks another prisoner; and (3) because BOP personnel followed the guidelines in the Program Statement when they classified Garcia and placed him in the minimum security Jesup institution, those guidelines do not render the discretionary function exception inapplicable. Accordingly, that exception shields the United States from liability to Cohen under the FTCA, and the district court should have dismissed Cohen's FTCA claim for lack of subject matter jurisdiction. In light of our holding that Cohen's FTCA claim should have been dismissed, the Government's argument that it was not negligent and Cohen's cross-appeal

claiming he was entitled to increased damages are moot.

IV. CONCLUSION

The district court's judgment is REVERSED.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-8737

District Court No. CV294-179

WILLIAM COHEN,

Plaintiff-Appellee,
Cross-Appellant

versus

UNITED STATES OF AMERICA,

Defendant-Appellant,
Cross-Appellee

Appeals from the United States District Court
for the Southern District of Georgia

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and were argued by counsel;

UPON CONSDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby REVERSED;

It is further ordered that each party bear their own costs on appeal.

Entered: August 26, 1998
For the Court: Thomas K. Kahn, Clerk
By: /s/ Matt Davidson
Deputy Clerk

REISSUED AS MANDATE: NOV 30 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 97-8737

WILLIAM COHEN,

Plaintiff-Appellee,
Cross-Appellant

versus

UNITED STATES OF AMERICA,

Defendant-Appellant,
Cross-Appellee

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___ F2d ___)

Before: CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:
The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E. O. Carnes
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 20 1998
THOMAS K. KAHN
CLERK

ORD-42
(6/95)

Full Text of Constitutional Provisions and Statutes Involved in the Present Case

Constitutional Provisions:

U. S. Constitution, Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Statutes:
(in numerical order by Title and Section)

18 USC §3521:

> (a)(1) The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness with respect to that proceeding, an offense set forth in chapter 73 of this title directed at the witness, or a State offense that is similar in nature to either such offense, is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the

participation of the witness in the judicial proceeding.

(2) The Attorney General shall issue guidelines defining the types of cases for which the exercise of the authority of the Attorney General contained in paragraph (1) would be appropriate.

(3) The United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not to provide protection under this chapter.

18 USC §3621(b):

(a) The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

18 USC §4041:

The Bureau of Prisons shall be in charge of a director appointed by and serving directly under the Attorney General at a salary of $10,000 a year. The Attorney General may appoint such additional officers and employees as he deems necessary.

18 USC §4042(2):

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> > (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
> >
> > (3) . . .

18 USC §4081:

> The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.

28 USC §501:

> The Department of Justice is an executive department of the United States at the seat of Government.

28 USC §503:

> The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.

28 USC §1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

28 USC §1346(b)(1):

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 USC §2671:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity,

temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 USC §2672:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal

agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 USC §2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 USC §2679(a):

The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b)

of this title, and the remedies provided by this title in such cases shall be exclusive.

28 USC §2680:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

42 USC §1997e(a):

(a) No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Kansas Stat. Ann. 75-6104(e):

A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

. . .

(e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved; . . .

[GOVERNMENT TRIAL EXHIBIT 4] Non-Guideline [_]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.) Docket No. 90-58-Cr-KING

Humberto Garcia) Defendant No 1

PRESENTENCE REPORT

Prepared for:
Honorable James Lawrence King
U.S. District Judge

Sentencing Date:
November 2, 1990

Prepared by:
Suzanne Ferreira-adm
U.S. Probation Officer

Office Location:
Miami, FL

Offense: Count 1: Possession With Intent To Distribute At Least 500 Grams Of Cocaine, Title 21, USC, Section 841(a)(1) and Title 18, USC, Section 2.

Penalty: 5 to 40 years BOP, 4 years supervised release, $2,000,000 fine and $50 assessment.

Date of Arrest: 1-17-90

Custodial Status: Released on $50,000 Corporate Surety Bond $100,000 Personal Surety Bond on 1-23-90.

Identifying Data

Date of Birth: Age: 32 Citizenship:

10-2-58		Cuban
Race: White	Sex: Male	Marital Status: Single
FBI No.: 168761T5	SSN: 265-37-8214	Dependents: 0
Education: 10th Grade	Marshal No.: 41734-004	Other ID No.: Alien #11643153

Legal Address: 9722 S.W. 142nd Place
Miami, FL 33187

Detainers: None

Codefendants: None

Assistant U. S. Attorney	Defense Counsel
Ray Pierson	Joel DeFabio
155 South Miami Avenue Miami, FL (305) 536-5450	2121 Ponce De Leon Blvd Suite 430 Coral Gables, FL 33134 (305) 448-7200

Date report prepared: 10-4-90

Revised:

Mandatory Minimum [_]

PART A. THE OFFENSE

Charges and Convictions

1. On August 14, 1990, Humberto Garcia pled guilty to a one count indictment charging him with Possession With Intent To Distribute At Least 500 Grams Of Cocaine, in violation of Title 21, USC, Section 841(a)(1) and Title 18, USC, Section 2. Sentencing has been scheduled for November 2, 1990 at 9:00 a.m.

Related Cases

2. None

The Offense Conduct

3. Beginning in October, 1989, until January, 1990, Special Agent Forteza with the Drug Enforcement Administration (DEA) had several meetings and telephone conversations with Humberto Garcia to discuss the purchase of between 15 and 20 kilograms of cocaine. S/A Forteza was introduced to Garcia through a confidential informant (CI). During a meeting on November 16, 1989, S/A Forteza advised Garcia that he was interested in purchasing approximately 20 kilograms of cocaine. Garcia responded that he could provide the cocaine, however, he would deliver between three and five kilograms as a sample in the initial transaction. He agreed to provide additional quantities of cocaine subsequent to the initial transaction.

4. On January 17, 1990, the CI contacted S/A Forteza and advised that he had made arrangements to meet with Garcia for the delivery of three kilograms of cocaine. A meeting was arranged at a DEA undercover office for later that day. At approximately 7:30 p.m., Forteza met with Garcia and the CI at the undercover office at which time Garcia delivered three kilograms of cocaine. Upon receiving the cocaine, S/A Forteza placed the defendant under arrest.

5. Laboratory analysis of the cocaine revealed a net weight of 3007 grams of cocaine with 92% purity which results in a total net weight of 2,766 grams of 100% pure cocaine.

Adjustment For Obstruction Of Justice

6. The defendant was released on bond on January 23, 1990. On June 21, 1990, the U.S Attorney's office filed a motion to revoke the defendant's bond based on allegations of threats to the confidential informant. According to the government's motion, prior to the defendant's case going to trial, he had contacted the CI through close friends and

associates. According to the government's motion, the CI received threats over the telephone as well as in a face to face confrontation with an associate of the defendant's. During the face to face confrontation, the CI was informed by the defendant's associate that the defendant was angry and would take action against the CI. The associate cautioned the CI to be careful since the defendant is a dangerous guy.

7 This motion was brought before Magistrate Palermo who denied the 'notion based on insufficient evidence that the defendant instigated the threats.

8 Section 3C1.1 of the sentencing guidelines provides for an enhancement were the defendant willfully impedes or obstructs the administration of justice. One of the examples provided in the application notes is threatening or intimidating a witness. It would appear that the allegations made by the government would in fact constitute an obstruction of justice. However, this matter was brought before Magistrate Palermo and he entered a ruling that insufficient evidence existed to determine that the defendant was the instigator of the threats. Therefore, an enhancement for obstruction of justice would not be appropriate in this case.

Adjustment For Acceptance Of Responsibility

9. Subsequent to his arrest, the defendant made no statements to the authorities acknowledging involvement in any criminal offense. However, subsequent to his plea of guilty, he provided a statement to the U.S Probation Office outlining his involvement in this offense and acknowledging personal responsibility for his criminal conduct.

Offense Level Computation

10. Base Offense Level: The guideline for a Title 21, USC, Section 841 is found in Section 2D1.1 of the sentencing guidelines. This section provides that offenses involving three kilograms of cocaine have a base offense level of 28. Pursuant to 1B1.3 relevant conduct, the court could consider the total amount of cocaine negotiated by the defendant which amounted to between 15 and 20 kilograms. However, the government has no evidence or reliable information that the defendant had the ability to produce the amount of cocaine for which they were negotiating. Therefore, the guidelines have been calculated using the quantity of cocaine that the defendant actually produced.
28

11. Specific Offense Characteristics: None 0

12. Adjustment For Role In The Offense: None 0

13. Victim Related Adjustment: None 0

14. Adjustment For Obstruction Of Justice: None 0

15. Adjusted Offense Level (Subtotal): 28

16. Adjustment For Acceptance Of Responsibility: The defendant has admitted his involvement in the offense and has demonstrated personal acceptance of responsibility for his criminal conduct. Based on 3E1.1(a), the offense level is reduced two levels. -2

17. TOTAL OFFENSE LEVEL: 26

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

18. None

Criminal Convictions

	Date of Arrest	Charge/Agency	Date Sentence Imposed/ Disposition	Guideline/ Score
19.	1-12-79 (age 20)	Ct. 1: Possession of Cocaine Ct. 2; Sale Of Cocaine Ct. 3: Conspiracy To Commit A Felony North Miami Police Dept.	9-27-79: (Case #79-1004A) Adjudication withheld, 1 year probation with $500 fine.	4A1.2(e) (2)

Codefendant Margarita Aragunde met with an undercover police officer in her vehicle to discuss the purchase of two ounces of cocaine for $2,800. Shortly thereafter, Humberto Garcia appeared and gave the codefendant one ounce of cocaine which she then sold to the undercover officer for $1,400. The defendant was represented by counsel.

20.	7-26-83 (age 24)	Case #83-1737 Ct. 1: Carrying A Concealed Firearm	4A1.1c Adjudicated guilty on Cts. 1 & 4, 18 months

probation.

Ct. 2:	
Possession Of Cocaine	Probation terminated on 11-4-85
Ct. 3:	
Carrying A Concealed Firearm	
Ct. 4:	
Resisting Arrest Without Violence, Metro Dade PD, Miami, FL	

On July 26, 1983, the defendant was observed at the Mayfair Shopping Center in Coconut Grove, Florida, carrying a handbag which appeared to contain a large weapon. He attempted to enter a nightclub at which time a club employee observed the bag and asked the defendant if it contained a gun. The defendant responded affirmatively and a uniformed police officer at the scene overheard the conversation. The defendant was placed under arrest and subsequent to a search a small quantity of cocaine was found on his person. Subsequent to his arrest, the defendant made threats to the nightclub employee in front of the uniformed police officer. He stated that he intended to cause him physical harm and that he would hire a hit man from Colombia to kill him.

Garcia was represented by defense counsel P. Nalley. On May 4, 1984, he was placed on 18 months probation. On August 2, 1984, an affidavit for violation of probation was filed with the court alleging that the defendant had violated probation by committing a new offense of attempted murder and possession of a controlled substance on July 1, 1984. The affidavit and probation violation were subsequently dismissed on December 5, 1984. Probation terminated on November 4, 1985.

Criminal History Computation

21. The defendant has one prior criminal convictions with a total of one criminal history point. This results in a criminal history category of I.

Other Criminal Conduct

	Date of Arrest	Charge/Agency	Date Sentence Imposed/ Disposition
22.	1-25-78 (age 19)	Ct. 1: Burglary Ct. 2: Loitering and Prowling, Metro Dade, PD Miami, FL	Dismissed
23.	2-6-78 (age 19)	Ct. 1: Carrying A Concealed Firearm Ct. 2: Dealing In Stolen Property Ct. 3: Obstruction Of Justice, Metro Dade PD, Miami, FL	Dismissed
24.	11-17-78 (age 20)	Ct. I: Possession Of Quaaludes, Miami Police PD, Miami, FL	Dismissed
25.	4-29-79 (age 20)	Ct. 1: Aggravated	No Information filed

		Assault On A Police Officer Ct. 2: Disorderly Conduct Ct. 3: Resisting An Officer Without Violence, Metro Dade PD, Miami, FL	
26.	3-22-80 (age 21)	Carrying A Concealed Firearm, Metro Dade PD, Miami, FL	No Information Filed
27.	1-26-83 (age 24)	Aggravated Assault, Metro Dade PD, Miami, Fl	Nolle Prossed
28.	10-1-83 Dismissed (age 25)	Obstruction By False Information, Metro Dade PD, Miami, FL	
29.	10-20-83 (age 25)	Ct. 1: Possession Of Machine Gun Ct. 2: Grand Larceny Ct. 3: Possession Of Firearm With Altered Serial Number	Nolle Prossed

Ct. 4:
Trafficking
In Cocaine
(73 grams)

Ct. 5:
Possession Of
Marijuana Over
30 Grams

Ct. 6:
Possession Of
Narcotic Equipment

Ct. 7:
Carrying Concealed
Firearm

Ct. 8:
Resisting Arrest
Without Violence

Probation

38. Statutory Provisions: The defendant is not eligible for probation as the offense of conviction is a Class "B" Felony, pursuant to Title 18, USC, Section 3561(a)(1).

39. Guideline Provisions: Probation is not authorized by the guidelines, as the offense of conviction is a Class "B" Felony, pursuant to 5B1.1(b)(1).

PART D. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities and Community Ties

40. Humberto Garcia was born in Havana, Cuba on October 2, 1958. He is the second of three children born to Sarah Garcia. According to the defendant, his father, Humberto Garcia, was a Mexican citizen who was not married to his

mother. He has no other information concerning his father nor has he had any relationship with him. Since the age of~10, Garcia lived with his maternal grandfather, Luis Manuel Garcia. In 1960, Garcia immigrated to the United States with his godfather, Carlos Martinez. His mother and sisters immigrated approximately one year later. The family established a residence in Miami and Sarah Garcia supported her children through her work as a beautician. The defendant has two half sisters, Alicia Garcia and Lilyana Traub, both of whom reside in Miami, Florida. According to the defendant, he does not have a close relationship with his family and has not had much contact with them in the previous year. Garcia has resided in Miami, Florida since 1960. He is a resident alien known to INS under alien #A11643153.

41. Contact was made with the defendant's sister, Lilyana Traub. After advising her of the purpose of the inquiry by the U.S. Probation Office, it became clear that Ms. Traub intended to use her cooperation with the U.S. Probation Office as some form of inducement for the defendant to comply with her wishes. She provided no information concerning the defendant's family background and would only remark that she had not spoken with her brother since he came to her house and physically assaulted her a few months ago. She would provide no information concerning the defendant's mother or how she could be contacted. The Probation Officer was unable to get additional information concerning immediate family members in order to verify the defendant's family history.

42. Although Humberto Garcia is single and has never married, for the previous six years he had been involved in a relationship with Mercedes Diez, age 28. She and the defendant are cohabiting and their residence is located at 9722 S.W. 142nd Place. This is a three bedroom townhouse located in the Southwest Section of Dade County. According to Ms. Diez as well as Dade County Property Records, the residence was purchased by Ms. Diez in May of 1990 for approximately $95,000. The

home was purchased in Diez's name and the defendant has no financial interest in the residence. Also living at the residence is Ms. Diez' eight year old son, Anthony Diez. According to the defendant and Ms. Diez, they share a close relationship, but have no plans for marriage.

Mental And Emotional

43. Garcia denies any history of mental or emotional disorders. During the course of the interview, he was coherent, articulate and exhibited no signs of such disorders. He is bilingual, fluent in English and Spanish.

Physical Condition, Including Drug Dependence and Alcohol Abuse

44. Humberto Garcia is a white male who stands 5'6" tall, weighs 165 pounds with brown hair and brown eyes. He is reportedly in good health and has never suffered from any serious illnesses. He denies the use of any drugs or narcotics and denies any alcohol consumption. According to the defendant, he does not smoke cigarettes, consume caffeinated beverages or sugar.

Education And Vocational Skills

45. Garcia attended South Miami Senior High School, but withdrew during the 10th grade. His school transcripts from 1975 indicate the defendant was earning a "D" average prior to his withdrawal. He has had no further education or vocational training.

Employment

46. Since 1986, the defendant, in partnership with Mercedes Diez, has operated a business known as Honey Bee's Florist Inc. The business is located at 7273 N.W. 36th Street in Miami, Florida. This is a retail flowershop which provides flower arrangements for individuals as well as

commercial accounts. According to the defendant, he derives an income of approximately $300 per week as a result of this business. Honey Bee's Florist was incorporated in the State of Florida on April 16, 1986 under document #M30563. According to the defendant and Ms. Diez, no tax returns have been filed for the corporation since 1986. A visit was made to the flower shop which appears. to be a small commercial florist shop operated by the defendant and Ms. Diez exclusively. During the visit to the employment site, Ms. Diez was present and engaged in some commercial transactions with various individuals. She had just received a shipment of flowers which the defendant had been in the process of cleaning and sorting. According to Ms. Diez, the business has been suffering financially since December, 1989 when a motor vehicle collided with the front entrance of the shopw The vehicle drove through the glass door and window to the shop causing approximately $15,000 worth of damage to merchandise and to the premises. According to Ms. Diez, they received an insurance settlement of only $4,000.

47. From 1984 through 1985, Garcia was reportedly been employed with various men's clothing stores including Luciano's and Alexandro's. According to the defendant, he was employed as a commissioned sales person and averaged between $300 and $500 per week. Attempts to verify employment with these two companies met with negative results. It appears that both companies may now be out of business.

48. From 1983 until 1984, Garcia was reportedly employed with Lansons Men Clothing Store at the Omni International Mall. He reportedly worked on a full-time basis as a salesman, averaging $500 per week in commissions. Contact was made with the payroll manager for Lansons and their records reflect the defendant was employed from November 29, 1984 until February 9, 1985 as a commissioned salesman.

49. Prior to 1983, Garcia stated he was employed doing various jobs including waiting tables at restaurants, teaching martial arts and working at health clubs. He was unable to recall all of the various places he worked and the time sequence of his various employments.

PART E. FINES AND RESTITUTION

Statutory Provisions

50. The maximum fine for this offense is $2,000,000, pursuant to Title 21, USC, Section 846.

51. A special assessment fee of $50 is mandatory under Title .18, USC, Section 3013.

Guideline Provisions

52. The fine range for this offense is from $12,500, 5E1.2(c)(l)(A) and $2,000,000, 5E1.2(c)(4)(A).

53. Subject to the defendant's ability to pay, the Court shall impose an additional monetary amount that is at least sufficient to pay the costs to the Government for any imprisonment, probation, supervised release or community confinement, Section 5E4.2(i). The most recent advisory from the Administrative Office of the U.S. Courts dated May 11, 1989, suggests that a monthly cost of $1,210.05 be used for imprisonment, a monthly cost of $91.66 be used for supervision and a monthly cost of $938.44 be used for community confinement.

Defendant's Ability To Pay

ASSETS

Cash	$ 0
Unencumbered Assets	

1985 Chevrolet Van	$4,000
Equity in Other Assets	
*1990 Jeep Cherokee	$1,000
TOTAL ASSETS	$5,000
Unsecured Debts	
Credit Cards	$3,695
TOTAL UNSECURED DEBTS	$3,595
NET WORTH	$1,305

*Seized By The D.E.A.

MONTHLY CASH FLOW	
Net Salary	$1,200
TOTAL INCOME	$1,200
NECESSARY LIVING EXPENSES	
Mortgage	$400
Electric	$ 75
Telephone	$ 30
Groceries/Supplies	$150
Clothing	$100
Installment Payments	$155
Gas	
TOTAL NECESSARY EXPENSES	$910
NET MONTHLY CASH FLOW	$290

Analysis

54. The defendant reports only two assets, one of which is a 1985 Chevrolet an valued at $4,000. This van is used for transportation and deliveries for Honey Bee's Florist. In January, 1990, Garcia purchased a Jeep Cherokee for approximately $25,000. According to the installment contract, Garcia made a $6,000 cash down payment and financed the balance which resulted in a $500 per month car payment. At the time of his arrest, the DEA seized the jeep and it now the subject of forfeiture proceedings. According to the defendant, he only made a $1,000 cash down payment on the vehicle and has approximately $1,000 in equity. Although he holds half interest in Honeybee's Inc., this company has no significant liquid assets and many outstanding debts. Further information concerning the company's financial status is unavailable since no tax returns have been filed since its inception. He reports no other significant assets. He shares monthly expenses with his girlfriend, Mercedes Diez. The residence in which they live is owned exclusively by Ms. Diez. Based on the defendant's current financial profile, it appears that he is unable to pay a fine.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

55. There are no aggravating or mitigating circumstances concerning the offense or the defendant that would warrant a departure from the prescribed guideline range.

PART G. IMPACT OF THE PLEA AGREEMENT

56. The defendant pled guilty to a one count indictment and there is no plea agreement in this case.

/s/ Suzanne Ferreira
Suzanne Ferreira
U.S. Probation Officer

Reviewed and Approved:
/s/ [illegible] Carroll
[illegible] Carroll
U.S. Probation Officer

Humberto Garcia Docket No. 90-58-Cr-KING

ADDENDUM TO THE PRESENTENCE REPORT

This probation officer certifies that the presentence report has been made available to the defendant, his attorney, and to counsel for the government.

OBJECTIONS

By the Government

The Government has reported no objections pursuant to Administrative Order 90-26.

By the Defendant

The defendant, through defense counsel makes one objection to the presentence investigation. The defense counsel points out that Paragraph 54, page 14 of the presentence investigation states the defendant purchased a vehicle in 1990 with a $6,000 cash down payment as reflected on a copy of an installment contract for the purchase.

According to the defendant, he made a $1,000 cash down payment. The balance of the down payment indicated on the installment contract consisted of factory rebates and allowances for a vehicle trade in.

Probation Officer's Response

The Probation Office has no objection to this additional information being included in the presentence investigation and will be made a part thereto by way of this addendum. There are no additional disputes with the presentence investigation.